83-1992

No. _____

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

COUNSEL

OSCAR B. GOODMAN
WILLIAM RAGGIO
JOHN SQUIRE DRENDEL
ROBERT S. CATZ

TERENCE J. ANDERSON
c/o University of
Miami School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for Petitioner.

June 4, 1984

QUESTIONS PRESENTED

1. Can the Executive's claim to have discretionary power to investigate and prosecute a sitting federal judge for his conduct in office be reconciled with the constitutional provisions designed to guarantee judicial independence and to keep separate the powers of government?

2. Does a sitting federal judge have a right to have his claim that the Executive's decisions to investigate and prosecute him for his conduct in office were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he exercised the judicial power resolved before he is required to submit to trial on the Executive's charges?*

*The caption lists all parties to the proceedings in the court of appeals. Petitioner notes here, as he did in the courts below, that all federal judges have interests that will be substantially affected by the disposition of the questions presented here and by the disposition of questions still pending before the district court.

TABLE OF CONTENTS

APPENDIX [separately bound]

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Other Authorities (Cont'd) — Page

No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States District Judge Harry Eugene Claiborne petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the judgment that court entered against him.

OPINIONS BELOW

On January 11, 1984, the district court entered an order denying petition-

er's motion to quash the indictment and dismiss the proceedings (App. 40). That decision is not reported. The court of appeals affirmed the district court's decision (App. 1-39). That decision is reported. United States v. Claiborne, 727 F.2d 842 (9th Cir. 1984).

JURISDICTIONAL STATEMENT

This petition seeks review of a judgment that the United States Court of Appeals entered on March 5, 1984. On April 26, 1984, Justice Rehnquist entered an order extending the time within which this petition could be filed to Sunday, June 3. This petition was filed on June 4, 1984. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's claims are based upon the provisions of the United States

Constitution governing the tenure and removal of federal judges. U.S. Const., art. III, § 1; art. I, § 2, cl. 5, and § 3, cl. 6 and cl. 7; and art. II, § 4. In order to resolve the questions presented, the Court will also have to construe provisions of the Constitution intended to allocate and keep separate the powers of the three branches of government (U.S. Const., art. I, § 1; art. II, § 1, cl. 1, § 2, cl. 1 and cl. 2, and § 3; and art. III, § 1 and § 2, cl. 1 and cl. 3) and the statute codifying the requirements for impartiality [28 U.S.C. § 455 (1982)]. These provisions have been included in the appendix to this petition (App. 83-85).

STATEMENT OF THE CASE

The Honorable Harry Eugene Claiborne is Chief Judge of the United States District Court for the District of Nevada. On December 8, 1983, attorneys for the United States filed an indictment alleging

that by his conduct in office Judge Claiborne had committed felony crimes against the laws of the United States (App. 43-54). On January 3, 1984, Judge Claiborne moved to quash the indictment and dismiss the proceedings (App. 55-64). In that motion he asserted two separate constitutional claims. First, he claimed that the constitutional provisions designed to keep separate the powers of government and to protect the independence of the Judiciary required that the impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive to compel a federal court to exercise criminal jurisdiction over one of its judges. Second, and alternatively, he claimed that at a minimum the Constitution prohibited an Executive prosecution initiated specifically for the purpose of punishing a

judge for his judicial acts and in retaliation for the manner in which he had exercised the judicial function. Id. In support of this second claim, Judge Claiborne alleged that the indictment and the decision to prosecute were the product of a three-year war initiated and maintained for one purpose: to drive Judge Claiborne from office and to punish him for the manner in which he executed the judicial office (App. 59-60, 66-72). He made a specific proffer and supplied affidavits and published reports making it clear that his allegations were in not way speculative (App 73-81). He claimed that the rights a judge derived from Article III of the Constitution and the need to prevent the Executive from impermissably intervening in the judicial function made it necessary that the court hear evidence in support of these claims and, if they

were proven, prohibit the Executive from proceeding to trial. The district court considered the proffer and rejected both claims without receiving evidence (App. 40).

The district court entered its order denying the motion on January 11, 1984 (App. 40). On January 20, 1984, Judge Claiborne noted his appeal from that order. The court of appeals filed its opinion and entered judgment on March 5, 1984 (App. 1, 41).

The court of appeals agreed that Judge Claiborne's first claim had presented substantial and unresolved constitutional issues and that the order denying that claim had been a final and appealable order under 28 U.S.C. § 1291 pursuant to the principles articulated by this Court in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47

(1949); Abney v. United States, 431 U.S. 651, 659-60 (1977); and Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979). The court affirmed the district court on the merits. The court went on to hold that to the extent the district court had denied Judge Claiborne's second claim, its order was not appealable, relying on this Court's decision in United States v. Hollywood Motor Car Co., 458 U.S. 263, 270 (1982) (per curiam) (orders denying due process challenges to vindictive prosecutions not immediately appealable) (App. 30-31). The court directed that its mandate issue forthwith and simultaneously entered an order denying Judge Claiborne's application for a stay sufficient to permit him to petition this Court for review. Judge Claiborne applied to this Court for a stay of trial proceedings pending the filing and disposition of the

petition. That application was initially denied by the Circuit Justice, and later by the full court, Claiborne v. United States, __ U.S. __, 104 S. Ct. 1401 (March 12, 1984)(Rehnquist, Circuit Justice in chambers); __ U.S. __, 104 S.Ct. 1463 (March 14, 1984). The trial began on March 12 and ended on April 13. The jury was unable to reach a verdict, and a mistrial was declared. The district court has set the case for re-trial beginning July 31, 1984.

REASON WHY REVIEW SHOULD BE GRANTED

1. This petition will be brief. In other contexts, this Court has twice in the past two years acknowledged that the judicial independence is sufficiently central to our constitutional scheme of government to command this Court's attention. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50

(1982) (lack of Article III protections precludes assignment of compulsory jurisdiction over contract claims of bankrupts to Article I bankruptcy judges), and Pulliam v. Allen, __ U.S. __, 52 U.S.L.W. 4525 (May 14, 1984) (common law immunity does not bar award of declaratory and injunctive relief and attorneys fees under federal civil rights statutes against state court magistrates). The Justices of this Court must be fully aware of the underlying constitutional issues raised by this petition and the practical consequences to the Judiciary. See, e.g., Petition for Writ of Certiorari, Hastings v. United States, __ U.S. __, 103 S.Ct. 1188 (1983) (cert. denied) (similar claims presented); cf., In Re Petition to Copy and Inspect Grand Jury Records, 576 F. Supp. 1275 (S.D. Fla. 1984), appeal pending, No. 84-5003 (11th Cir.)(special

panel) and Hastings v. Judicial Conference, No. 83-3850 (D.D.C. filed Dec. 23, 1983) (for illustrations of consequences upon return of acquitted district judge upon return to the bench). The Executive's exercise of its claimed powers here has again made the federal judiciary notorious and newsworthy. See, e.g., J. Riley, Stacked Deck for a Judge? Focus Shifts to Probe Tactics, 6 Nat'l L. J. 1 (Jan. 23, 1984) and The Deal Conforte Cut: Is It Legal?, id. at 30 (reporting conflicts between federal agents and judges in Nevada). In essence, this petition simply asks this Court to act upon that awareness and acknowledge that the fundamental constitutional questions concerning the protections necessary to maintain the constitutionally mandated independence of federal judges are as deserving of this Court's attention as are questions concern-

ing the scope of common law immunities that must be afforded state court judicial officers.

2. The constitutional questions are fundamental. The Honorable Harry Eugene Claiborne is a federal judge. Pursuant to Articles I, II, and III of the Constitution, he is entitled to hold office and exercise the judicial power of the United States unless and until he resigns or has been impeached by the House of Representatives and tried and convicted by the Senate of "Treason, Bribery, or other high Crimes and Misdemeanors." U.S. Const., art. I, § 2, cl. 5, and § 3, cl. 6; art. II, § 4; and art. III, §§ 1 and 2. The framers designed these provisions to protect members of the Judiciary from coercion or interference by the Executive. They concluded that impeachment and removal by Congress was the only remedy for judicial misconduct "consistent with

the necessary independence of a judicial character." The Federalist, No. 79 (Hamilton) 513-14 (Mod. Lib. ed. 1937).

Until recent times the framers' understanding was shared by all three branches of government, here and in England. The Crown has never prosecuted a judge holding good behavior tenure prior to removal or resignation. That constitutional tradition is 283 years old. Act of Settlement, 1700, 12 & 13 Will. 3, ch. 2 & 3. For the first one hundred fifty years of this nation's history, the Executive never attempted to prosecute an Article III judge; charges of serious judicial misconduct were invariably referred to the House of Representatives. See J. Borkin, The Corrupt Judge (1962) (for a summary).

In the past two years, two circuits have considered a federal judge's claim

that the Constitution defines a mandatory sequence of remedies for alleged criminal misconduct in office. United States v. Claiborne, supra, and United States v. Hastings, 681 F.2d 706 (11th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1188 (1983). Both have concluded that the right asserted by the accused judge "would be wholly deprived of meaning if he were forced to undergo trial before he could assert it." United States v. Claiborne, App. 8, quoting from United States v. Hastings, 681 F.2d 706, 708. Both have recognized that the claim presents substantial issues of interbranch comity that directly effect the independence of Article III judges and that have not been resolved by this Court. Claiborne, id.; Hastings, 681 F.2d 706, 708-09. This Court should grant review to resolve these questions.

3. The Executive has asserted that the Attorney General, the United States Attorneys, and their subordinates have a discretionary power of prosecution that can be exercised against federal judges for the very conduct by which those judges exercise the judicial power in cases to which the Executive is a party. The Executive claims that this power necessarily embraces the power to employ "informant[s], undercover operatives, wire intercepts, electronic surveillance and grand jury process" to investigate judicial conduct it finds suspect.[1] The use of mail intercepts and purchased testimony have been added to the list of claimed powers by this case. The Justice Department has acknowledged that, in the first five years of its existence (1976-

1. Brief for Appellee United States of America, at 42-43, United States v. Hastings, supra.

1980), the Criminal Division's Public Integrity Section exercised some or all of these claimed powers to investigate alleged criminal conduct by twenty-five federal judges and that, in the year preceding that acknowledgement, it had exercised discretion in declining to prosecute in four instances.[2]

The information that is not known and cannot be discovered is perhaps more important. We do not know how many federal judges the Public Integrity Section has investigated since 1980, or how many have been formally or informally investigated by local United States Attorneys or other federal agencies. The Executive has not reported whether any

---

2. Judicial Tenure and Discipline-1979-80: Hearings Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 96th Cong., 1st and 2d Sess. (Comm. Print. 1980), 160 and 160 n.4 (Statement of Maurice Rosenberg, Assistant Attorney General).

of these judges have been made aware of the investigations or their results, or if any have been informed of the bases upon which prosecutorial discretion was exercised in their favor. We do not know and cannot know how many citizens now seek to vindicate their constitutional rights before judges who have been made aware that 'there but for the grace of the prosecutor go I'.

There are five hundred United States District Judges in active service. Almost fifty percent of the cases coming before them involve disputes to which the Executive is a party.[3] Daily, these judges must deal with Justice Department attorneys and Assistant United States Attorneys employed to assert the Executive's interests and, on the criminal side, to exer-

3. See, e.g., [1983] Annual Report of the Director of the Administrative Office of the United States Courts.

cise its powers. Daily, these judges are called upon to accept or reject the work of these attorneys and of the Executive's investigative agencies in controversies affecting the most fundamental rights of the people - the other parties to those actions. Friction is inevitable. This Court should grant review to determine the extent to which these judges may properly be subjected to the investigative and prosecutorial powers held by the attorneys who represent the Executive before their courts.

4. Judge Claiborne's motion presented a second constitutional claim. He alleged and offered to prove that the Executive's decisions to investigate and prosecute him were motivated in fact by an intent to drive him from judicial office and to punish him for the manner in which he had exercised the judicial power

in cases to which the Executive had been a party. He claimed that, at a minimum, the Constitution must be construed to afford a federal judge protections comparable to the protections afforded individual members of Congress under the speech and debate clause. See, e.g., United States v. Brewster, 408 U.S. 501 (1972) (Speech and debate immunity limited to protect legislative acts from attack). Judge Claiborne asserted that judges must be protected from exercises of Executive discretion intended directly to undermine the judicial function.

That claim was a claim to immunity from having to endure the burdens of trial and was based upon rights Judge Claiborne holds as a judge, not upon due process rights he holds as an individual. On appeal, Judge Claiborne urged that the district court's order denying that claim

was comparable to an order denying a congressman's fact-based claim that the Speech and Debate Clause barred a specific prosecution or an individual's fact-based claim that the Double Jeopardy clause barred a specific prosecution. See Helstoski v. Meanor, 442 U.S. 500 (1979), and Abney v. United States, 431 U.S. 651 (1977).

The court of appeals thought review of that claim was barred by this Court's decision in United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (orders denying due process challenges to prosecution not immediately appealable). By equating an Article III judge's claim to constitutional immunity from prosecution with an individual's claim that Executive conduct violated his or her due process rights, the court of appeals effectively denied the claim on the merits. The

rights Judge Claiborne asserted by that claim also "would be wholly deprived of meaning if he were forced to undergo trial before he could assert it." If the Executive has the power to force a federal judge to endure the costs and burdens of trial, the Executive has the power to punish a judge. This Court should grant review to determine whether the court of appeals decision on this issue is consistent with the principles this Court has applied in cases such as Helstoski or Abney.

5. The criminal prosecution of a federal judge must (as it has here) result in such substantial disruptions of the judicial business and departures from the accepted and usual course of judicial proceedings as to call for guidance from this Court in the exercise of its supervisory powers. The necessary and the

probable disruptions are apparent. The Executive's decision to prosecute an active judge must necessarily cause considerable disruption in the management of the judicial business. The recusals in the District of Nevada and the Ninth Circuit and the extent to which the Chief Justice has had to use the designation power to select judges to hear this and related cases illustrate one part of the problem.

Those disruptions also call into question the impartiality of the Judiciary. Decisions required in this and any comparable case must necessarily define privileges and immunities incident to the federal judicial office. The judges who preside will be resolving questions that substantially affect their own interests and the interests of every other federal judge. The appearance of impartiality is

also destroyed. Judges are tried by specially designated judges. Reasonable observers must reasonably question whether a presiding judge can maintain impartiality when the conduct of a fellow judge is the subject of the prosecution.

This Court has already ruled that, in controversies between an Article III judge and another branch of government requiring construction of section 1 of Article III, the Judiciary is as a matter of law deprived of the required impartiality. United States v. Will, 449 U.S. 200, 210-14 (1980). There the doctrine of necessity compelled a reluctant Court to act because there was no other forum where the controversy could be adjudicated. Id. at 214-18. Here, however, the necessity to proceed beyond the jurisdictional questions presented is not apparent. The Constitution specifies a procedure by

which and a forum in which a federal judge can be prosecuted and tried for the crimes alleged here.

Further significant disruptions must also flow from an acquitted judge's return to the bench. The practical effect of a criminal prosecution followed by an acquittal is that the Executive may have effectively disqualified the acquitted judge from exercising the judicial power. In the bitter aftermath of this litigation, Judge Claiborne may be called upon to resume the role of impartial judge in controversies to which his present adversary is a party. It will thereafter be in the power of the government's attorneys to argue that the judge must disqualify himself because "his impartiality might reasonably be questioned." See 28 U.S.C. § 455(a) (1982). Indeed, any individual criminal defendant might question whether

a once-acquitted judge would have the impartiality or independence to again challenge the Executive by ruling against it on difficult or close questions. It would be hard to declare that such a defendant has no reasonable grounds for such a challenge. See Reid v. Covert, 354 U.S. 1, 22 (1957) (due process requires criminal charges against non-military personnel be tried before judge enjoining Article III protections).

The United States is party to all criminal and numerous and substantial civil actions in the district courts. Every litigant coming before those courts is entitled to an impartial assignment of judges. Every district judge is entitled to expect a fair distribution of the judicial work of the district. To cripple one judge is not fair to the judge crippled nor to the remaining judges nor

to the litigants who come before that court. The Constitution does not provide for handicapped Article III judges.

The Judiciary has demonstrated that it has the ability to adapt its normal procedures to address the problems presented by the abnormal case. But the necessity for judges to create and employ special procedures to address the problems presented by a case which requires that federal judges exercise the judicial power to resolve charges brought by the Executive against another federal judge are unique and require special sensitivity. At a minimum, the procedures by which such cases are handled should be uniform among the circuits and designed to minimize the disruptions during and in the aftermath of these cases. The problems this case has caused and will create illustrate clearly the kinds of

disruptions the Judiciary will have to confront if the practice is to continue. Simply stated, these disruptions may threaten the Judiciary's ability to administer its own affairs and cause reasonable observers to question the impartiality with which such cases are decided. This Court should exercise its supervisory jurisdiction to provide the necessary guidance.

6. The decision below conflicts with principles this Court has consistently held necessary to maintain an independent Judiciary. In 1982, this Court twice reiterated the history, the function, and the importance of the doctrine of judicial independence. Northern Pipeline, supra, and Nixon v. Fitzgerald, 457 U.S. 731 (1982). That doctrine was developed to assure the people that federal judges could and would exercise the judicial

power impartially and without fear of consequences to themselves.

> This was a doctrine "'not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences.'"

Nixon v. Fitzgerald, 457 U.S. 731, 745-46 [quoting Pierson v. Ray, 386 U.S. 547, 554 (1967), quoting Scott v. Stansfield, L.R. 3 Ex. 220, 223 (1868)]. Its importance is clear:

> In sum, our Constitution unambiguously enunciates a fundamental principle--that the "judicial Power of the United States" must be reposed in an independent Judiciary. It commands that the independence of the Judiciary be jealously guarded, and it provides clear institutional protections for that independence.

Northern Pipeline, 458 U.S. 50, 60 (plurality opinion).

In Northern, the Court was required

to consider the effect of the differences in judicial independence between Article III judges constitutionally guaranteed "life tenure, subject only to removal by impeachment . . . and a fixed and irreducible compensation" and the new bankruptcy judges appointed to fourteen-year terms, subject to discipline or removal by the judicial councils, and guaranteed only the salary protection afforded all federal civil officers. A majority of the Justices were persuaded that the possibilities for interference by the Executive, Congress, and by judicial colleagues posed sufficient danger that Congress could not delegate mandatory jurisdiction over common law contract claims to such judges [458 U.S. 50, 52-89 (plurality opinion); see also, id. at 89-92 (Rehnquist, J., concurring)]. This Court should now consider whether judges who sit subject to

the Executive's prosecutorial discretion have the independence necessary to adjudicate claims involving our most fundamental rights.

This Court's decision in Nixon v. Fitzgerald also makes it clear that petitioner here is not seeking relief that would place him above the law. Petitioner claims no immunity; he claims only that, unless he chooses to resign, the Constitution defines the correct sequence by which his judicial conduct may be challenged and judged: impeachment and removal first, and then, and only then, prosecution and trial. He claims that both the Constitution and the doctrine of separation of procedures of powers confer upon him a right to insist that that sequence be followed.

In Nixon, this Court addressed the claim that immunity from civil liability for conduct in office would make the

President a 'man so high he was above the law.' In rejecting the claim, the Court ruled:

> A rule of absolute immunity for the President will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive. There remains the constitutional remedy of impeachment.[39] . . .
>
> The existence of alternative remedies and deterrents establishes that absolute immunity will not place the President "above the law." For the President, as for judges and prosecutors, absolute immunity merely precludes a particular private remedy for alleged misconduct in order to advance compelling public ends.

---

39. The same remedy plays a central role with respect to the misconduct of federal judges, who also possess absolute immunity. See Kaufman, Chilling Judicial Independence, 88 Yale L.J. 681, 690-706 (1979). Congressmen may be removed from office by a vote of their colleagues. U.S. Const. Art. I, § 5, cl. 2.

457 U.S. at 757-58 (other footnotes omitted).

The rule of absolute immunity from civil liability for the President or for federal judges may advance compelling public ends, but it does so at the expense of substantial private rights. In that context, the constitutional remedy of impeachment is a limited alternative: it protects "the public interest in the rule of law," but does nothing to remedy the private wrong.

A requirement that the constitutional remedy of impeachment precede the Executive's exercise of prosecutorial discretion against a federal judge advances a compelling public end: the interest of the people in having an independent Judiciary. It does so at the expense of neither public nor private rights. As a remedy for 'high Crimes and Misdemeanors' in office, the constitutional remedy is a true remedy. In that context it vindi-

cates the same rights as the criminal laws. For a judge, it is a supplemental, not an alternative, remedy. Far from placing judges above the law, it subjects them to the law and defines the correct sequence of remedies for official misconduct. After a judge's removal from office, the Executive may prosecute and the Judiciary may judge him like any other man.

We aspire to have a 'government of laws, not of men;' but those laws must be administered by men, and we have always known that 'men entrusted with power tend to abuse it.' The judicial office exists to assure that we remain a government of laws. The guarantees of life tenure and irreducible compensation were given to insulate the judicial officer from the temptations of political ambition and the fear of personal consequence. Both

the temptations and the fear encourage abuse of official power. Thcse guarantees were granted, not to protect the judge, but to assure the people that we would retain 'a government of laws, not of men.'

The court of appeals decision threatens tremendous harm to one of the most treasured values of our constitutional system. That court yielded that which was not its to give: the right of the people to an independent Judiciary. This Court should not permit such a decision to stand as a precedent for the future unless it is fully satisfied that the delicate balance can be preserved.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit

to review the judgment that court entered against him.

Respectfully submitted,

Counsel
OSCAR B. GOODMAN
WILLIAM RAGGIO
JOHN SQUIRE DRENDEL
ROBERT S. CATZ

TERENCE J. ANDERSON
c/o University of
Miami School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for Petitioner.

83-1992

No.

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1983

THE HONORABLE HARRY EUGENE CLAIBORNE,
UNITED STATES DISTRICT JUDGE,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

COUNSEL

OSCAR B. GOODMAN
WILLIAM RAGGIO
JOHN SQUIRE DRENDEL
ROBERT S. CATZ

TERENCE J. ANDERSON
c/o University of
Miami School of Law
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-2971

Attorneys for Petitioner.

June 4, 1984

TABLE OF CONTENTS

FILED
MAR 5 1984

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	No. 84-1009
	)	DC#
v.	)	CR-R-83-57-WEH
	)	Nevada (Reno)
HARRY EUGENE CLAIBORNE, Defendant-Appellant.	)	OPINION

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA
WALTER E. HOFFMAN,
SENIOR DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED FEBRUARY 24, 1984

Before: GIBSON, GARTH, and KENNEDY, Circuit Judges.*

PER CURIAM:

This interlocutory appeal raises anew the issue whether the United States Constitution immunizes a sitting federal

*Sitting by designation: the Honorable Floyd R. Gibson of the Eighth Circuit; the Honorable Leonard I. Garth of the Third Circuit; and the Honorable Cornelia G. Kennedy of the Sixth Circuit.

judge from criminal prosecution prior to his removal from office by the impeachment process. Appellant, Harry Eugene Claiborne, is a United States Judge for the District of Nevada. He was appointed to the bench in August, 1978. On December 8, 1983, a seven count indictment was returned against Claiborne. Count I of the indictment alleged that Claiborne solicited and received $30,000 from Joseph Conforte, a Las Vegas brothel owner, in return for being influenced in the performance of official acts--i.e., decisions regarding motions in a pending case. (18 U.S.C. § 201(c)). Count II alleged that Claiborne caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte. (18 U.S.C. § 1343). The scheme to defraud allegedly involved Claiborne's accepting $55,000 from Conforte in return for promising to

secure the reversal of Conforte's criminal tax evasion conviction by bribing one or more judges on the Ninth Circuit Court of Appeals.[1]

Claiborne's trial is scheduled to begin on March 12, 1984. On January 3, 1984, Claiborne filed inter alia a motion to quash the indictment and to dismiss the proceedings against him, claiming the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through the impeachment process. The district

---

1. Count III of the indictment charges that Claiborne obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating Claiborne. (18 U.S.C. § 1503). Counts IV, V, and VI charge that Claiborne failed to report the bribes as income on his tax returns. (26 U.S.C. § 72061(1)). Count VII, unrelated to the other charges, alleged that Claiborne had knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee (18 U.S.C. § 1001).

court judge[2] denied the motion by an amended order dated February 8, 1984. In that order, the trial court found Claiborne's claim "frivolous" and stated that the case would proceed to trial as scheduled on March 12, 1984. The district court also indicated its intention to hear other pretrial motions on February 21, 1984. Claiborne filed an interlocutory appeal of this order with the Ninth Circuit Court of Appeals. Characterizing the district court's order as "a final collateral order", Claiborne claims this interlocutory appeal vested exclusive jurisdiction in this court pursuant to 28 U.S.C. § 1291 and divested the district court of jurisdiction to proceed. Claiborne also filed an application for writ of prohibition and mandamus, seeking

---

2. The Honorable Walter E. Hoffman of the Eastern District of Virginia, sitting by designation.

to stay the trial court from proceeding until this court resolved the merits of his interlocutory appeal. By an order dated February 16, 1984, we declined to stay the district court's proceedings of February 21, 1984, without prejudice. Claiborne renewed his motion for a stay on February 17, 1984.

I. Appealability

Claiborne's motion to dismiss was based upon the separation of powers principle of the Constitution and specific constitutional provisions which purportedly immunize a federal judge from criminal prosecution until he is removed from office by the impeachment process. As the parties agree, we have jurisdiction to review Claiborne's noncertified interlocutory appeal from the district court's dismissal of this claim.

Although 28 U.S.C. § 1291 limits appellate court's jurisdiction to "final decisions of the district courts", the Supreme Court has permitted departures frcm this rule where an interlocutory order falls into the "collateral order" exception announced in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 545-47 (1949). Under that exception, an interlocutory order is immediately appealable if it "conclusively determines the disputed question, resolve[s] an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from final judgment." Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); United States v. Hollywood Motor Car Co., 458 U.S. 263, 265 (1981). In Abney v. United States, 431 U.S. 651, 659-60 (1977), the Court, applying Cohen, held that an interlocutory

order denying defendant's pre-trial motion to dismiss an indictment on double jeopardy grounds was immediately appealable. And in Helstoski v. Meanor, 442 U.S. 500, 506-08 (1979), the Court held immediately reviewable a Congressman's pretrial claim that the Speech and Debate clause immunized him from criminal prosecution. Both Abney and Helstoski, in addition to satisfying the other requirements of Cohen, involved "an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." Hollywood Motor, 458 U.S. at 266. The defendants in those two cases raised claims based upon "the right not to be tried, which must be upheld prior to trial if it is to be enjoyed at all." United States v. MacDonald, 435 U.S. 850, 860-61 (1978).

In United States v. Hastings, 681 F.2d 706 (5th Cir.), stay denied, 103 S.

Ct. 1188 (1982), the court concluded that a claim identical to the one raised here was an appealable collateral order. The defendant there, as here, contended that, under the separation of powers principle, an active federal judge has an absolute right not to be indicted and tried in a federal court unless and until he is impeached and convicted by Congress and removed from office. The court stated:

> Like the right secured by the speech or debate clause in Helstoski or the right secured by the double jeopardy clause in Abney, the right asserted by Hastings is the freedom from the obligation to endure a criminal trial which would be wholly deprived of meaning if he were forced to undergo trial before he could assert it.
>
> (Id. at 708)

We agree with Hastings and conclude we have jurisdiction to review the merits of Claiborne's claim. See also United States v. Meyers, 635 F.2d 932, 935-36 (2nd Cir. 1980) (Congressman's claim of

immunity from criminal prosecution under separation of powers principle held immediately appealable.)

II. Merits

Article III of the Constitution affords members of the federal judiciary substantial protections to assure their freedom from coercion or influence by the executive and legislative branches. Specifically, federal judges are appointed for life terms, subject only to removal by impeachment; they hold their offices "during good behavior"; and their compensation cannot be diminished during their continuance in office. See United States ex rel. Toth v. Quarles, 350 U.S. 11, 15-16 (1955). In addition to these specific constitutional safeguards, federal judges, like state judges, enjoy an absolute common law immunity from civil liability for acts committed in their

official capacity. Stump v. Sparkman, 435 U.S. 349, 355-57 (1978).

However, in accordance with a system of checks of balances, the Framer's of the Constitution gave the legislative branch the power to deal with acts of misconduct by federal judges. Art. II, § 4 provides that "all civil officers of the United States[3] shall be removed from office on impeachment for, and conviction of, treason, bribery or other high crimes and misdemeanors". The House of Representatives is given the sole power of impeachment. Art. I, § 2. The Senate is given the sole power to try all impeachments. Art. I, § 3. The legislative power is limited insofar as the judgment entered after a conviction on impeachment cannot go beyond removal from office and disqual-

3. Federal judges are "civil officers" within the meaning of this clause. Shurtleff v. United States, 189 U.S. 311, 316 (1903).

ification to hold future office. Art. I, § 3. Also, "the party convicted shall nevertheless be liable and subject to indictment, trial, judgment, and punishment according to law." Art. I, § 3 cl.7.

There is no specific constitutional provision limiting the executive branch's power to prosecute federal judges on criminal charges; nor is there any provision excepting federal judges from the executive branch's broad authority "to take care that the laws be faithfully executed." Art. II, § 3. Claiborne, however, contends that the Constitution's grant to the legislative branch of the power to remove a judge for high crimes and misdemeanors and the general principles of separation of powers preclude the executive branch from prosecuting him on criminal charges unless and

until he has been removed from office by impeachment.

Identical immunity claims were squarely faced and rejected in United States v. Hastings, 681 F.2d 706, 709-11 (5th Cir.), stay denied, 103 S. Ct. 1188 (1982) and United States v. Isaacs, 493 F.2d 1124, 1141-1144 (7th Cir.), cert. denied, 417 U.S. 976 (1974).[4] Both Hastings and Isaacs held that the Constitution does not immunize a sitting federal judge from the processes of criminal law. The sentiment underlying these holdings is that: "no man in this country is so high that he is above the law. . . . A judge no less than any other man is subject to the processes of the criminal law".

---

4. Hastings and Isaacs are the only two cases where an indicted federal judge has claimed immunity from criminal prosecution prior to impeachment. Two other active federal judges were indicted on criminal charges, but neither raised the immunity issue. See Hastings, 681 F.2d at 706 n.7.

Hastings, 681 F.2d at 711; Isaacs, 493 F.2d at 1133. We wholeheartedly agree with Hastings and Isaacs and are substantially guided by them in disposing of Claiborne's arguments.

Claiborne's first argument is that specific constitutional provisions give Congress the exclusive primary jurisdiction to try and punish federal judges for high crimes and misdemeanors through the impeachment process. He principally relies upon article I, § 3 cl. 7 which states:

> Judgment in cases of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

According to Claiborne, this language means that a federal judge cannot be

indicted and tried in an Article III court unless he has been removed from office by the impeachment process. Both Isaacs and Hastings rejected this tortured interpretation, concluding that § 3 was intended "to assure that after impeachment a trial on criminal charges is not foreclosed by the principle of double jeopardy." Isaacs, 493 F.2d at 1142, citing R. Berger, Impeachment: The Constitutional Problem, at 78-80 (1973); Hastings, 681 F.2d at 710. Hastings states:

> [S]ection 3 represents an attempt by the framers to anticipate and respond to questions that might arise regarding the procedural right of the accused during the impeachment process. Like article III, § 2 cl. 3 which provides that the right to trial by jury does not extend to impeachment proceedings, section 3 serves to clarify the rights of civil officers accused of high crimes and misdemeanors, not to limit the jurisdiction of article III courts.
>
> (footnotes omitted.)

We agree with the Fifth and Seventh Circuits' reading of Article I § 3 cl. 7.

Claiborne also contends the Constitution's vesting of impeachment power exclusively in the Congress precludes criminal prosecutions of sitting federal judges. Two very important assumptions underlie this contention. First, impeachment is the exclusive means of removing federal judges from office; and second, a criminal prosecution is the equivalent of removal from office. We, like the court in Hastings, are unwilling to accept this second assumption. See Hastings, 681 F.2d at 710 n.10. In Burton v. United States, 202 U.S. 344 (1906), a United States Senator made the comparable claim that a criminal conviction was the equivalent of expulsion from the Senate, which required a two-thirds vote of the Senate. The Court rejected this claim, stating: "the final judgment of conviction [does]

not operate, ipso facto, to vacate the seat of the convicted Senator, nor compel the Senate to expel him or to regard him as expelled by force alone of the judgment". Id. at 369. In Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970), both Mr. Justice Douglas and Mr. Justice Black noted the important distinction between criminal proceedings and impeachment proceedings against federal judges. Justice Black, while emphasizing that federal judges could be removed from office only by impeachment, stated that "judges, like other people, can be tried, convicted, and punished for crimes". Id. at 141-42. Justice Douglas stated that "[i]f they [federal judges] break a law they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress." Id. at 140. Finally, the

legislative history of the 1980 Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 (28 U.S.C. § 372) is replete with statements recognizing that while Congress retains the exclusive power to remove federal judges from office for high crimes and misdemeanors, federal judges, like other people, are subject to criminal prosecution for their misdeeds.[5]

---

5. Judicial Tenure and Discipline 1979-80: Hearings Before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice of the House Committee on the Judiciary, 96th Cong. 1st and 2nd Sess. (1979-80).

Hunter, Elmo B., Judge, Western District of Missouri representing the Judicial Conference of the United States testified:

> Certainly, the members of the Court Administration Committee and of the Judicial Conference have been especially sensitive to that concern. They recognize that judges have no right to be insulated from the consequences of their own misbehavior when it impairs the proper operation of the courts and the administration of justice.

[Footnote Continued]

5. Continued

> First, I would like to turn to a consideration of the kind of conduct involved in our problem. We need not discuss criminal conduct as such. Federal and State criminal statutes apply to every Federal judge just as they apply to any other citizen.

Id. at 54-55. (Emphasis added).

Rodino, Peter W. (Rep. D. NJ) Chm. House Judiciary Committee testified:

> I believe [the impeachment process] was designed so in order that we be very careful and very deliberate about the application of this process of impeachment, and I think that if we look back, we find that impeachment being an action that is taken only as of last resort, really would serve us well only in such instances and only after all other possible actions may have been taken to cure whatever the problem may have been.
>
> . . .
>
> I just want to remind you that the Constitution itself provides that impeachment is no substitute for the ordinary application of the criminal laws, since in article I, section 3, it specifies that impeachment does not immunize the officer from criminal liability for his

5. Continued

> wrongdoing, and indeed may be brought to the bar of justice for the violation of any criminal statute.

Kastenmeier, Robert W., Chairman of Subcommittee stated:

> I would certainly concur with what the chairman [Rodino] said, that impeachment doesn't mean that you only try people who are guilty of violation of criminal laws; nor does it mean that you cannot be subjected to punishment under the criminal laws, even though impeachment does not occur.
>
> Id. at 138.

McClory, Robert, ranking minority member stated:

> For instance, if a circuit council received evidence that a crime had been committed, it would be inappropriate, it seems to me, to refer it to the Judiciary Committee for impeachment. Instead, it should be referred to a grand jury to determine whether or not the person should be indicted and tried. I believe that we want to avoid in legislation a requirement that all cases should be referred to the House Judiciary Committee for impeachment.
>
> Id. at 141. (emphasis added).

5. Continued

Rosenberg, Maurice, Asst. Atty. Gen. Office for Improvements in the Admin. of Justice, stated:

> In terms, impeachment applies only if the offense is treason, bribery, high crimes, and other misdemeanors, but misconduct of that kind is, of course, a criminal offense and will be prosecuted criminally. Just a few days ago, on March 27, Chairman Rodino and the ranking minority member, Mr. McClory, testified that in the event criminal actions are brought against a Federal judge, as I understand it, the Judiciary Committee on the House side will stay its hand as far as impeachment proceedings are concerned until the criminal proceedings have run their course. If they eventuate in a conviction, then I don't expect that we will see in the future--we have not seen in the past--any judge remain on the bench after his conviction of an impeachable crime.
>
> That means if the sequence is criminal process first, then impeachment, we simply are not going to see impeachment used. The criminal process is so much broader than the impeachment process that impeachmnt is sort of a supplement to prosecution,

Claiborne's second line of argument finds its source in the salutary principles of separation of powers and judicial independence. Like the defendant in Hastings, he asserts that the judiciary would be subject to intolerable pressures from the executive branch if executive officers were permitted to prosecute

---

5. Continued

> its purpose being to remove a judge convicted of a serious crime. Impeachment is not going to be often-used or effective if there is need for taking action against judges who have been guilty of reprehensible behavior that doesn't rise to the level of criminal prosecutability.

See also S. Rep. No. 362, 96th Cong. 1 Sess. 4 (1979), reprinted in 1980 U.S. Code & Ad. News 4315, 4318-19; H.R. Rep. No. 1313, 96th Cong., 2d Sess. 5 (1980).

Claiborne suggests the 1980 Act includes a determination by Congress that active federal judges may not be prosecuted by the Executive. In view of the foregoing legislative history and the language of the 1980 Act, we agree with Hastings that this claim is totally devoid of merit. See Hastings, 681 F.2d at 712 n.20.

active federal judges. He avers that immunity from criminal liability is a necessary complement to the specific safeguards of Article III -- most significantly, life tenure during good behavior. We disagree. Article III protections, though deserving utmost fidelity, should not be expanded to insulate federal judges from punishment for their criminal wrongdoing. See Isaacs, 493 F.2d at 1143. Hastings, 681 F.2d at 711. As the Supreme Court stated in United States v. Lee, 106 U.S. 196, 220 (1882):

> No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.
>
> It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the

> limitations which it imposes upon the exercise of the authority which it gives.

The Supreme Court has applied Lee's rationale in rejecting Congressmen's claims that they were immunized from criminal prosecution prior to expulsion. See Burton v. United States, 202 U.S. 344, 368 (1906); United States v. Brewster, 408 U.S. 501, 516-20 (1972). In Brewster, for example, a Senator charged with having taken a bribe (18 U.S.C. § 201) claimed that the Speech or Debate clause precluded criminal prosecution. The Court rejected this claim stating:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative Branch, but no more than the statutes we apply, was its purpose to make members of Congress super-citizens, immune from criiminal responsibility.
>
> . . .

> The sweeping claims of appellee would render members of Congress virtually immune from a wide range of crimes simply because the acts were peripherally related to their holding office.
>
> . . .
>
> Depriving the Executive of the power to investigate and prosecute . . . bribery is unlikely to enhance legislative independence.

Id. at 516, 520, 525.

We similarly think it unlikely that judicial independence would be measurably diminished by subjecting judges to the processes of criminal laws. First, aside from Article III safeguards, judges enjoy the same protection as ordinary citizens do from vindictive prosecution. Hastings, 681 F.2d at 711. Second, as Brewster emphasized, a criminal prosecution encounters several procedural barriers -- such as the indictment, burden of proof, and presumption of innocence. The Court in Isaacs, referring to these

and other procedural safeguards afforded a criminal defendant, concluded that the independence of the judiciary is better served when criminal charges against judges are tried in court rather than in Congress. Isaacs, 493 F.2d at 1144. Indeed, it is all too well known that the impeachment process is particularly cumbersome, time consuming, and susceptible to political whim and emotional reaction. Third, the possible abuse by the executive branch is minimized because "[t]he check and balance mechanism, buttressed by unfettered debate in an open society with a free press, has not encouraged abuses of power or tolerated them long when they arose." Brewster, 408 U.S. at 520. Finally, it is important to recognize that "criminal conduct is not part of the necessary functions performed by public officials. Punishment for that

conduct will not interfere with the legitimate operation of a branch of government." Isaacs, 493 F.2d at 1144. As perceptively noted in Brewster, 408 U.S. at 526: "Taking a bribe is, obviously, no part of the legislative process or function." This applies equally to the judicial branch.

In support of his claim that judicial independence will be substantially diminished without criminal immunity, Claiborne focuses on the practical consequences of an acquittal on criminal charges. He suggests that, if acquitted, his impartiality will be called into question every time he sits in a case in which the executive branch is a party. Purportedly, this will unduly diminish Claiborne's judicial authority and disrupt the judiciary's ability to administer its own affairs.

Though this argument has some persuasive appeal it does not carry the day. First, we think Claiborne has overstated the ability of the executive branch to force the recusal of an acquitted federal judge on bias grounds. The Supreme Court has stated that the trial judge's bias is presumed only where the judge has a personal or financial stake in the outcome or has been the target of personal abuse or criticism. See Withrow v. Larkin, 421 U.S. 35, 47 (1975); Taylor v. Hayes, 418 U.S. 488, 501-03 (1974); see also S. Rep. No. 419, 93d Cong. 1st Sess. 5 (1973). (the "appearance of impartiality" test of 28 U.S.C. § 455(a) was not intended to "warrant the transformation of a litigant's fear that a judge may decide a question against him into a 'reasonable fear' that the judge will not be impartial.") The second and more compelling

reason we reject Claiborne's claim is that the proposed solution to the problem is much worse than the problem itself. As Hastings states, "the minuscule incremental judicial independence that might be derived from [a rule granting sitting federal judges immunity from criminal prosecution] would be outweighed by the tremendous harm that the rule would cause to another treasured value of our constitutional system: no man in this country is so high that he is above the law." 681 F.2d at 711. It can scarcely be doubted that the citizenry would justifiably lose respect for and confidence in a system of government under which judges were apparently held to be above the processes of the criminal law.[6]

---

6. In urging Hastings and Isaacs were wrongly decided, Claiborne relies heavily on Northern Pipeline Construction Co. v. Marathon Pipeline Co., 458 U.S. 50 (1982)

[Footnote continued]

6. [Continued]

and Nixon v. Fitzgerald, 457 U.S. 731 (1982). Both cases are inapposite and of no aid to Claiborne. Northern Pipeline, which invalidated the Bankruptcy Act of 1978 insofar as it conferred Article III powers on non Article III judges, simply emphasized the importance of providing Article III judges with the appropriate protections of salary stability and life tenure. Nixon v. Fitzgerald, giving the President absolute immunity from civil damages for his official acts, merely cites cases recognizing that judges are absolutely immune from civil liability for acts committed in their official capacity. The "public interest" justification for granting immunity in civil suits against judges would not similarly apply to criminal actions. See O'Shea v. Littleton, 414 U.S. 488, 503 (1974), where the court states:

> [W]e have never held that the performance of the duties of judicial, legislative, or executive officers, requires or contemplates the immunization of otherwise criminal deprivations of Constitutional rights. Cf. Ex parte Virginia, 100 U.S. 339 (1880). On the contrary, the judicially fashioned doctrine of official immunity does not reach "so as to immunize criminal conduct proscribed by an Act of Congress. . . ." Gravel v. United States, 408 U.S. 606, 627 (1972).

[Footnote Continued]

III. Non-appealable Claim

Claiborne's second claim on this appeal is that the government's investigation and prosecution was motivated by a desire to retaliate against him for the manner in which he had exercised the functions of his office. He claims that the constitutional principal of an independent federal judiciary requires that the district court hold pre-trial evidentiary hearings to determine whether the executive's prosecution was improperly motivated.

Claiborne raises what is essentially a vindictive or selective prosecution claim, which is not immediately appealable under "the collateral order" exception. United States v. Hollywood Motor Car Co.,

---

6. Continued

Cf. Dennis v. Sparks, 449 U.S. 24, 28 n.5 (1980) (state judge who is immune from civil liability is not immune from criminal liability).

458 U.S. 263, 270 (1982). Under the logic of Hollywood Motor, such a claim fails to meet Cohen's requirement of being "effectively unreviewable on appeal from final judgment." To afford Claiborne the interlocutory relief he seeks in the name of judicial independence would have the effect of giving him more protection that ordinary citizens raising similar claims enjoy. See Hastings, 681 F.2d at 711.

IV. District Courts Jurisdiction to Proceed

Having determined that Claiborne's first claim, though appealable, lacks merit, we must determine whether the district court ever lost jurisdiction to proceed. Specifically, we must decide whether the district court had jurisdiction to hear the pre-trial motions of February 21, 1984.

Ordinarily, if a defendant's interlocutory claim is considered immediately appealable under Abney, the district court loses its power to proceed from the time the defendant files its notice of appeal until the appeal is resolved. United States v. Yellow Freight System, Inc., 637 F.2d 1248, 1252 (9th Cir. 1980), citing Moroyoqui v. United States, 570 F.2d 862, 864 (9th Cir. 1977), cert. denied, 435 U.S. 997 (1978); United States v. Garner, 663 F.2d 834, 837-38 (9th Cir. 1981); United States v. Burt, 619 F.2d 831, 838 (9th Cir. 1980). See Griggs v. Provident Consumer Discount Co., ___ U.S. ___, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982). This divestiture of jurisdiction rule is not based upon statutory provisions or the rules of civil or criminal procedure. Instead, it is a judge made rule originally devised in the context of civil

appeals to avoid confusion or waste of time resulting from having the same issues before two courts at the same time. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Hitchmon, 602 F.2d 689, 691-92 (5th Cir. 1979) (en banc). Given this purpose, it has been suggested that "the rule should not be employed to defeat its purpose or to induce needless paper shuffling." 9 J. Moore, Federal Practice, ¶ 203.11 at 3-44 n.1 (1980); see also C. Wright, A. Miller, E. Cooper & E. Gressman, Federal Practice and Procedure, § 3949, at 358-59 (1977).

The divestiture rule takes on added significance when applied to interlocutory Abney-type criminal appeals since two important countervailing policies are at work. On the one hand, a defendant raising a meritorious Abney-type claim -- asserting a valid, constitutional "right

not to be tried" -- would be irreparably harmed if the trial court continued to proceed to trial prior to the disposition of the appeal. On the other hand, under an automatic divestiture rule, a defendant raising a meritless Abney-type claim could significantly delay and disrupt criminal trial court proceedings. Burt, 619 F.2d at 838. See also Abney, 431 U.S. at 656-57 ("the delays and disruptions attendant upon intermediate appeal . . . are especially inimical to the effective and fair administration of the criminal law"). The Court in Abney, mindful of the need to balance these two interests, directed appellate courts to exercise their supervisory powers to establish summary procedures for quickly disposing of frivolous, dilatory pre-trial appeals.

The Fifth Circuit in United States v. Dunbar, 611 F.2d 985, 987-89 (5th Cir.),

cert. denied, 447 U.S. 9266 (1980) (en banc; twenty-five judges) followed Abney's directive and adopted the "dual jurisdiction" rule that "appeal from the denial of a frivolous [Abney-type] motion does not divest the district court of jurisdiction to proceed with trial, if the district court has found the motion to be frivolous." This approach has been uniformly followed by other circuits. United States v. Leppo, 634 F.2d 101, 104 (3rd Cir. 1980); United States v. Head, 697 F.2d 1200, 1204 n.4 (4th Cir. 1982); United States v. Lanci, 669 F.2d 391, 394 (6th Cir. 1982); United States v. Cannon, 715 F.2d 1228 (7th Cir. 1982); United States v. Grabinski, 674 F.2d 677, 679 (8th Cir. 1982) (en banc).

The Ninth Circuit[7] implicitly adopted Dunbar's dual jurisdiction

---

7. Sitting as special panel for the Ninth Circuit, we are bound by applicable Ninth Circuit case law.

approach in United States v. Spilotro, 680 F.2d 612, 615 (9th Cir. 1982) and in United States v. Crozier, 674 F.2d 1293, 1297 (9th Cir. 1982). Both Spilotro and Crozier held that the interlocutory review of a collateral order restraining the sale or transfer of defendant's property did not divest the district court of jurisdiction to proceed. The Ninth Circuit, however, has yet to adopt Dunbar in the context of an Abney-type claim involving a "right not to be tried". This reluctance is due to the Ninth Circuit's concern that a defendant who has raised a meritorious Abney-type claim would be irreparably harmed if the trial court were allowed to proceed to trial prior to the appellate court's disposition of the claim. Burt, 619 F.2d at 838. This concern is not as vitally involved when only pre-trial hearings proceed in the district court rather than the trial

itself. Because this court has now determined that Claiborne's asserted "right not to be tried" claim lacks merit, the trial court's continuation of pre-trial hearings was harmless. Requiring the district court to rehear and rule again on the same matters would achieve nothing other than to significantly disrupt and delay an ongoing criminal trial, a result running afoul of the purpose behind the divestiture rule and the court's dictum in Abney. As the court stated in Leppo, 634 F.2d at 104, "[a] ritualistic application of the divestiture rule in the Abney context conflicts with the public policy favoring rapid adjudication of criminal prosecutions."

The district court scrupulously followed the procedures set forth in Dunbar by finding, as a predicate to its assertion of retained jurisdiction, that Claiborne's separation of powers claim was

frivolous. Though we now disagree with that characterization of Claiborne's claim, no useful purpose would be served by requiring that court to redecide the pre-trial motions on February 21, 1984. Under the circumstances, therefore, it was harmless for the district court to proceed to hear the motions of February 21, 1984. See Hastings, 681 F.2d at 709, n.4. (Court, while characterizing defendant's separation of powers claim as "nonfrivolous", nevertheless recognized that under Dunbar "the trial court could have determined that the issues raised . . . were frivolous and then proceeded to trial without awaiting the determination of the court of appeals").

However, in view of the jurisdictional problems to which we have referred, we suggest that the district court reenter on the record the motions, findings, and other matters contained in the hearing

transcript of February 21, 1984, without the need for reargument or retaking testimony.

We therefore affirm the district court's order denying Claiborne's motion to quash the indictment; we deny the petitions for writs of mandamus and prohibition, and deny as moot the renewed motion for a stay. Let the mandate issue forthwith.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
Plaintiff,)
)
vs.) CR-R-83-57-WEH
)
HARRY EUGENE CLAIBORNE,)
Defendant.)

ORDER

This court having considered the Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers, the memoranda in support thereof and opposition thereto, and the Supplemental Memorandum and Proffer in Support of Requested Factual Proceedings;

IT IS HEREBY ORDERED, adjudged, and decreed that the Motion be and it hereby is DENIED.

Entered this 11th day of January, 1984.

Walter E. Hoffman
United States District Judge
Sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 4-1009
D.C. Docket No. CR-R-83-57-WEH
Nevada (Reno)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HARRY EUGENE CLAIBORNE,

Defendant-Appellant

Appeal from the United States District Court for the District of Nevada

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the District of Nevada, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, AFFIRMED.

March 5, 1984

Issued as Mandate Mar. 5, 1984

San Francisco, California

Filed Dec. 8, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	) Criminal No. CR-R-83-57-WEH
v.	) INDICTMENT [18 U.S.C. §§ 201, 7342, 1503, 1001]
HARRY EUGENE CLAIBORNE, Defendant.	) [26 U.S.C. § 7206(1)]

THE GRAND JURY CHARGES:

COUNT I

Between on or about December 14, 1978 and December 15, 1978, in the District of Nevada, the Defendant, HARRY EUGENE CLAIBORNE, being a public official, that is a United States District Court Judge for the District of Nevada, directly and indirectly, corruptly asked, demanded, exacted, solicited, sought, accepted, received and agreed to receive for himself a thing of value, that is United States currency in the amount of $30,000, from Joseph Conforte, in return for being

influenced in his performance of an official act, that is the decisions and rulings that he made and was to make and the timing of those rulings with regard to two consolidated motions to quash grand jury subpoenas then pending before him, said motions captioned, In the Matter of Application of Olga Irene Karaway For an Order to Show Cause, Misc. R-78-36, and In Re Grand Jury Subpoena Served on Sessina Lowe, Misc. R-78-35; in violation of Title 18, United States Code, Section 201(c).

COUNT II

1. From on or about March 8, 1979 and continuing to and including April 30, 1980 in the District of Nevada and elsewhere HARRY EUGENE CLAIBORNE, named herein as the defendant, devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by

means of false and fraudulent pretenses, representations, and promises to Joseph Conforte, well knowing that the pretenses, representations and promises would be and were false and fraudulent when made, which scheme is more fully set forth below.

2. It was a part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that he could corruptly secure the reversal of the criminal convictions of Joseph and Sally Conforte in the case of United States v. Joseph Conforte, et. al., (No. 77-3956 and No. 78-3310).

3. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would falsely represent that, in order to secure the reversal of the criminal convictions of Joseph and Sally Conforte, he would bribe one or more judges of the United States Court of Appeals for the Ninth Circuit.

4. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would represent that the said corrupt reversal of the criminal convictions of Joseph and Sally Conforte would be accomplished in consideration of $55,000 paid on or about March 8, 1979, and $45,000 that would be required to be paid to the defendant at a later date.

5. It was a further part of the scheme to defraud that the defendant, HARRY E. CLAIBORNE, would make certain false statements to Joseph Conforte and Stanley Brown, Sr., as agent for Joseph Conforte, to lull Joseph Conforte into believing that his conviction would be reversed and that the defendant was the person responsible for corruptly causing the reversal.

6. In furtherance of that portion of the scheme to defraud as described in

Paragraph No. 5 above, the defendant, HARRY E. CLAIBORNE, did, on several occasions, falsely advise Joseph Conforte and Stanley Brown, Sr. that the defendant had, on several occasions, spoken with the judges of the United States Court of Appeals for the Ninth Circuit and that those judges had advised the defendant that they would reverse the conviction of Joseph Conforte.

7. On or about June 3, 1979, in the District of Nevada, the defendant, HARRY E. CLAIBORNE, for the purposes of executing the aforesaid scheme and artifice to defraud and attempting to do so did cause to be transmitted in interstate commerce by means of a wire communication, that is, a telephone communication, between a location within the State of California and Reno in the State of Nevada, certain signs, signals and sounds, in violation of

Section 1343 of Title 18 United States Code.

COUNT III

Between on or about April 30, 1982 and July 1, 1982, in the District of Nevada, the Defendant, HARRY E. CLAIBORNE, willfully and knowingly, corruptly did endeavor to influence, obstruct and impede the due administration of justice in the United States District Court for the District of Oregon, in that the said, HARRY E. CLAIBORNE, knowing that one Stanley Brown, Sr., had received a subpoena requiring him to appear on May 11, 1982 and that he intended to reappear at an undetermined date following July 2, 1982, before the Grand Jury for the District of Oregon which was inquiring into possible violations of the federal bribery laws, urged, advised and persuaded Stanley Brown, Sr. to give false testimony

before said Grand Jury in relation to the aforesaid investigation; in violation of Title 18, United States Code, Section 1503.

COUNT IV

On or about October 15, 1979, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1978, which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 21) in the amount of $92,340.44 whereas, as he then and there well knew and believed he

received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT V

On or about June 15, 1980, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1979 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $80,227.04 whereas, as he then and there well knew and believed he received substantial income in addition to that

heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VI

On or about June 15, 1981, in the Judicial District of Nevada, HARRY EUGENE CLAIBORNE, a resident of Las Vegas, Nevada, did willfully and knowingly make and subscribe a United States Individual Income Tax Return, Form 1040, for the calendar year 1980 which was verified by a written declaration that it was made under penalties of perjury and was filed with the Internal Revenue Service, which said income tax return he did not believe to be true and correct as to every material matter in that the said return reported total income (Line 22) in the amount of $54,251.00 whereas, as he then and there well knew and believed he received substantial income in addition to that heretofore stated; in violation of Title 26, United States Code, Section 7206(1).

COUNT VII

1. At all times pertinent herein HARRY EUGENE CLAIBORNE, Defendant herein, was a Judge of the United States District Court for the District of Nevada.

2. At all times pertinent herein the Ethics in Government Act of 1978, Public Law 95-521, required, among other things, that every year each Judge of the United States District Courts submit a report disclosing items describing the nature and extent of financial holdings, liabilities and transactions including, among other things, loans owed by the Judge at any time during the portions of the previous calendar year that the individual was a Judge.

3. On or about June 20, 1979, in the District of Nevada, HARRY EUGENE CLAIBORNE, Defendant herein, did willfully and knowingly make and use and cause to be

made and used a false writing and document knowing it to contain a false, fictitious and fraudulent statement and entry as to a material fact in a matter within the jurisdiction of the Judicial Ethics Committee of the Judicial Conference of the United States ("Committee"), a department or agency of the United States in that in his financial disclosure report for the calendar year 1978, made pursuant to the Ethics in Government Act of 1978, Public Law 95-521, and submitted to the Committee, HARRY EUGENE CLAIBORNE misrepresented the extent and nature of his financial liabilities existent during the calendar year 1978, in that he excluded an outstanding personal loan of $76,000 made to him by a person or persons unknown to the grand jury whereas, in truth and fact, as HARRY EUGENE CLAIBORNE then knew, said loan was made, did exist, and was

outstanding at some time during the portion of the calendar year 1978 that the Defendant was a United States District Judge, in violation of Title 18, United States Code, Section 1001.

A TRUE BILL

_____
Foreman

_____
STEVEN A SHAW
Attorney
Public Integrity Section
Criminal Division
Department of Justice
Washington, D.C. 20530

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR-R-83-57-WEH
HARRY EUGENE CLAIBORNE, Defendant.	)	

MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne moves that this Court enter an order quashing the indictment and dismissing the proceedings against him on the grounds that:

a. The Constitution requires that impeachment and removal by the Legislative Branch precede the exercise of prosecutorial discretion by the Executive and the judicial power by the Judiciary to determine whether conduct in office by a United States judge in active service constitutes

high crimes or misdemeanors under the laws of the United States; and

b. The Executive's actions in investigating and using the grand jury to investigate Judge Claiborne's conduct in office have violated the Constitution and are inconsistent with the principles designed to keep separate the powers of government and the provisions adopted to guaranty the independence of the Judiciary by guaranteeing the independence of the individual federal judge.

In support of this Motion, Judge Claiborne states:

1. In 1978, President James Earl Carter nominated Harry Eugene Claiborne to be a United States District Judge on the United States District Court for the District of Nevada. The Executive Branch conducted a full investigation and the Senate of the United States held hearings

to satisfy themselves that the professional and personal experience and qualifications of Harry Eugene Claiborne qualified him for appointment to that post. With knowledge and information developed, the Senate exercised its constitutional function and gave its advice and consent to the appointment of Harry Eugene Claiborne as a United States Judge. In August, 1978, with that advice and consent and having fully satisfied himself that the appointment of Harry Eugene Claiborne was consistent with the policies of the then Executive, the President exercised his constitutional function and prerogative and appointed Harry Eugene Claiborne a United States District Judge.

2. Judge Claiborne took the required oath and assumed judicial office on September 1, 1978. He has been a judge in

active service on this Court since that date, becoming its chief judge on May 1, 1980. He has been, is, and will remain entitled to hold and exercise the powers of that office free from coercion or undue interference by the Executive unless and until he is impeached by the House of Representatives for, and convicted by the Senate of, "Treason, Bribery, or other high Crimes and Misdemeanors" (U.S. Const., art. I, §§ 2 and 3; art. II, § 4; and art. III, §§ 1 and 2).

3. In exercising the powers and performing the duties of a United States district judge, Judge Claiborne has regularly had to decide cases and controversies to which the United States was a party and in which the interests of the United States were asserted by attorneys acting under the supervision and control of the Attorney General of the United

States. Since assuming the duties of his office, in the exercise of independent judicial discretion, Judge Clairborne has frequently found it necessary to render decisions adverse to positions vigorously asserted by attorneys for the United States, including attorneys responsible for exercising the Executive's investigatory powers and prosecutorial discretion and for prosecuting persons charged with violating the laws of the United States. These decisions have made Judge Claiborne unpopular with some of the attorneys who represent the United States and with other agents who act under the control and supervision of the Attorney General of the United States.

4. Since 1978 and continuing to the present, attorneys and other persons acting under the supervision and control of the Attorney General of the United

States have used the investigative and prosecutorial powers of the Executive and have invoked the criminal processes of the federal courts to develop facts upon which they might induce a federal grand jury to return an indictment against Judge Claiborne.

5. The Executive has been motivated in exercising these powers by an intent to retaliate against Judge Claiborne and to bring coercive pressure upon him for the manner in which he has exercised the judicial power in cases to which the Executive was a party and for other actions he has taken as a judge.

6. The actions of the Executive's attorneys in investigating Judge Claiborne during the past five years have disrupted the judiciary in the District of Nevada and the Ninth Circuit and have interfered with Judge Claiborne's right and ability

to exercise the functions of his office freely and properly. By its actions in obtaining and filing the indictment, the Executive (a) has forced Judge Claiborne to declare a mistrial in a major prosecution in which a jury had been impanelled and substantial evidence taken; (b) has compelled the reassignment of all cases pending before Judge Claiborne; (c) has required the designation of a judge from outside the circuit, disrupting the judicial business of the Eastern District of Virginia as well as that of the District of Nevada and interfered with the right and ability of the judges of this district to manage and control the judicial business of this district; and (d) has attempted to force this Court to adjudicate a claim by the Executive that a member of this Court has, by his conduct in office, committed high crimes and

misdemeanors under the laws of the United States.

7. There are more than 500 United States District Judges in active service. The proper exercise of the judicial function requires that each be free, and be seen by the people to be free, to exercise the judicial power in cases and controversies to which the United States is a party without fear of coercion or retaliation by attorneys for the United States who may be dissatisfied with a judge's exercise of the judicial function.

8. The existence and exercise of the powers the Executive has exercised here against Judge Claiborne is inconsistent with the guarantee that United States judges will have life tenure subject only to the powers of impeachment and removal vested in the Legislative Branch. The existence of these powers and their

exercise against Judge Claiborne cannot be reconciled with the doctrines developed to assure the powers of government would be kept separate and exercised by independent and coordinate branches of government.

9. The specific manner in which and the intent with which the Executive has exercised its powers and used the grand jury and other criminal processes of the courts to obtain an indictment against Judge Claiborne directly violates the purpose and function of the provisions granting him life tenure and assigning the sole power of impeachment to the House of Representatives.

Accordingly, for the reasons set forth above, for those developed in the accompanying Memorandum of Law, and in light of the facts to be shown upon an evidentiary hearing on the allegations set forth in this motion, United States

District Judge Harry Eugene Claiborne requests that this Court enter an order quashing the indictment and dismissing these proceedings and granting him such other and further relief as the Constitution and the nature of his office may require.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
WILLIAM RAGGIO, ESQ.
JOHN SQUIRE DRENDEL, ESQ.

By _____
OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for Defendant

By _____
TERENCE J. ANDERSON, ESQ.
ROBERT S. CATZ, ESQ.
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
Telephone: (305) 284-2971
As Counsel to Oscar Goodman, Esq.
Attorney for the Honorable
Harry Eugene Claiborne

65-81

IN THE UNITED STATES DISTRICT
FOR THE DISTRICT OF NEVAJ

UNITED STATES OF AMERICA, Plaintiff,	)	
vs.	)	CR-R-83-57-WEH
HARRY EUGENE CLAIBORNE, Defendant.	)	

SUPPLEMENTAL MEMORANDUM AND PROFFER IN SUPPORT OF REQUEST FOR FACTUAL PROCEEDINGS ON MOTION TO QUASH INDICTMENT AND DISMISS PROCEEDINGS: VIOLATION OF JUDICIAL INDEPENDENCE AND SEPARATION OF POWERS

United States District Judge Harry Eugene Claiborne files this Supplemental Memorandum and Proffer to assure that this Court is properly advised and that the record is clear with respect to his request, in the alternative, for factual proceedings in connection with his Motion to Quash Indictment and Dismiss Proceedings: Violation of Judicial Independence and Separation of Powers (the "Motion").

Preliminary Statement

By the Motion, Judge Claiborne made two claims. First, he asserted that the Constitution defined the correct sequence of remedies for allegations of malconduct in office against a federal judge: impeachment and removal by the Congress and then, but only then, executive prosecution and judicial trial. Second, and in the alternative, Judge Claiborne asserted that, if the constitutional prohibition against executive prosecution and judicial trial prior to legislative impeachment and removal was not absolute, then, and at a minimum, the Court must conduct factual proceedings to determine whether the specific manner in which and intent with which the government had initiated and conducted the investigation and obtained the indictment against him was inconsistent with the rights and

privileges guaranteed every federal judge as incidents to the judicial office.

At a hearing held on January 9, 1984, this Court orally stated that the Motion would be denied. At the same time, the Court indicated that it did not perceive the relevance and was concerned by the time being consumed by counsel's attempted oral proffer of facts relevant to the Motion's second claim. This Supplemental Memorandum and Proffer is submitted to assure that the basis upon which these facts are deemed relevant is clear and to submit an adequate proffer without consuming further time by oral proceedings.

Supplemental Memorandum

The Supreme Court has long recognized that there are certain constitutional claims that a defendant may assert in criminal proceedings that are collateral to the question of guilt or innocence and

so important that they must be resolved prior to any trial on the merits, e.g. Abney v. United States, 431 U.S. 651 (1977). Some of these claims require that the trial court conduct evidentiary proceedings to determine whether the claims asserted are valued, e.g. double jeopardy claims such as those asserted in Abney.

The Supreme Court has also recognized that claims by a public official that the Constitution prohibits specific proceedings against him raise collateral questions that may require factual proceedings and that must be resolved before the merits can be reached. Helstoski v. Meanor, 442 U.S. 500 (1979); Nixon v. Fitzgerald, 457 U.S. 731 (1982); see also United States v. Brewster, 408 U.S. 501 (1972).

By the Motion, Judge Claiborne asserts that at a minimum this Court must conduct factual proceedings to determine whether the Executive's decisions to investigate his conduct in office, its decisions and conduct with respect to the manner in which its investigations were conducted and the grand juries used, and its decision, its conduct in obtaining the indictment here evidence an intent to retaliate against him for the manner in which he has exercised the judicial function or a conspiracy among officials of the Executive to drive him from office or burden his ability to act as a judge in the future in matters in which the Executive has an interest.

These claims are based solely upon the rights and guarantees embodied in the Constitution to guarantee the independence of the Judiciary and to maintain the

proper separation of executive, legislative, and judicial function and powers. The constitutional bases upon which Judge Claiborne asserts these claims is wholly different from the bases upon which Harry Eugene Claiborne as an individual, asserts similar claims based upon his rights under the Fourth, Fifth, and Sixth Amendments to the Constitution. The facts underlying both types of claims however, are similar. That is why the factual allegations contained many of defendant's other pretrial motions are incorporated in the proffer.

The fact that the bases for the claims Judge Claiborne asserts in the Motion are incident to the judicial office creates two other significant distinctions from the claims he asserts as an individual. First, because these judicial office claims are collateral, both the discovery

and the evidentiary proceedings should be completed on the Motion before the Court proceeds to trial or hearings on the merits. For that reason, the proffer also identifies and incorporates discovery motions relevant to the claims asserted by the Motion. Second, the burden of proof and the burden of going forward should also be different for the claims asserted by the Motion than that established for individuals asserting comparable claims in pre-trial motions. The Supreme Court's reiteration that the Constitution "commands that the independence of the Judiciary be jealously guarded. . ." makes this clear. Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

In sum, if the Court had found that Judge Claiborne was entitled to evidenti-

ary proceedings on the Motion, Judge Claiborne would have:

1. Offered evidence to establish the factual allegations made in the Motion, in the supporting Memorandum, and in the other pre-trial motions incorporated in the proffer;

2. Offered evidence to prove the specific facts alleged in the proffer;

3. Asserted rights, in connection with proceedings on the Motion, to discover the information requested in the motions incorporated into the proffer, subject to such protective orders or agreements as may be necessary to protect the government's legitimate interests; and

4. With such discovery as the Court granted, offered evidence to prove or tending to prove the facts supporting the claims asserted in the Motion.

Proffer

Judge Claiborne proffers that, if the court permitted hearings upon the claims asserted in the Motions, the evidence would show or tend to support an inference that:

1. Prior to his appointment to judicial office, the FBI investigated him and submitted negative evaluation of his fitness and recommended he not be appointed. The Senate was aware of that report and recommendation at the time it exercised its constitutional prerogative and unanimously consented to the appointment of Harry Eugene Claiborne as a United States District Judge. President Carter and his advisors were aware of that report and recommendation at the time the President exercised his constitutional prerogative and appointed Harry Eugene Claiborne as United States Judge. Judge Claiborne

would prove these allegations, if the government denied them, by subpoenaing from the government, the report and recommendations and records and testimony showing that it has been communicated to the office of the President and to the appropriate committee of the Senate.

2. Notwithstanding the President's decision to reject the FBI's evaluation and recommendations and to appoint Judge Claiborne, subordinate officials of the FBI continued their investigation into Judge Claiborne's pre-judicial conduct after he had taken office. As part of that investigation, they used the processes of a federal grand jury in Las Vegas, Nevada, but were unable to obtain or present evidence sufficient to obtain an indictment. Judge Claiborne would support these allegations, if the government denied them: (a) by asking that this

Court examine the records of the grand juries sitting in Las Vegas, Nevada, during the period September 1, 1978 through December 31, 1980, for the purposes of establishing the existence and result of these investigations and (b) by subpoenaing Geoffery Anderson, former Chief of the United States Department of Justice Organized Strike Force in Las Vegas, Nevada; and Joseph Yablonsky, agent-in-charge, of the Nevada office of the FBI, as an adverse witness, to elicit testimony as to the investigative activities conducted under their supervision and with their knowledge during that period; (c) by subpoenaing the Honorable Roger Foley, senior United States District Judge and others to provide testimony and documents evidencing an open, notorious, and flagrant declared intent by Strike Force attorneys and FBI agents to use the

powers of their offices to drive Judge Claiborne and other federal judges from office or to so impair his ability to function that he would not be able to preside in cases in which those agencies objected to his participation.

2. Between 1978 and the present, attorneys employed by the United States Department of Justice and agents of the Federal Bureau of Investigation have improperly threatened and attempted to intimidate individuals other than Judge Claiborne in order to induce such individuals to give testimony that would implicate Judge Claiborne in criminal or improper judicial activity. Specifically, Judge Claiborne incorporates the facts alleged in and incorporated into Defendant's Motion to Dismiss Indictment for Selective Prosecution and Multiform Governmental Misconduct and Abuse and For

Evidentiary Hearing (No. 26). In support of these allegations, if the government denied them, Judge Claiborne would subpoena and call the individuals named in that motion and its attachments and would subpoena and introduce the documents and reports described therein.

4. From April 8, 1980, to December 8, 1983, attorneys for the Strike Force and the Public Integrity Section, including Geoffery Anderson and Steven Shaw, with the support and assistance of federal agents, including Joseph Yablonsky, have continuously employed federal grand juries and other investigative techniques to obtain evidence and intimidate others to provide evidence that Judge Claiborne had engaged in improper conduct. Judge Claiborne incorporates as part of this Proffer the facts alleged in his Motion to Dismiss for Grand Jury Abuse; to Discover

Grand Jury Materials; to Interview Grand Juries; and for Evidentiary Hearing (the "Grand Jury Motion") (No. 28). Judge Claiborne also incorporates as part of this proffer the facts alleged in his Motion to Disqualify Special Prosecutor (the "Shaw Motion") (No. 21). To support these allegations, if the government denied them, Judge Claiborne would call: Geoffery Anderson, Joseph Yablonsky, Steven Shaw, the Honorable Roger Foley, Eddie LaRue, Ralph Lamb, John Moran, the Honorable Thomas O'Donnell, FBI Agent Patrick Murphy, former Las Vegas Police Detective Chuck Lee, Joseph Conforte, the Honorable Warren J. Ferguson, former District IRS Director Gerald Swanson, Peter Perry, Peter Lemberes, Alex Lemberes, Treasury Department Investigator Roderick Loss, James Brown, the Honorable Floyd Lamb, Leland Lutfy, the Honorable

Phillip Pro, Jerry Watson, Oscar B. Goodman, Lawrence Semenza, the Honorable Lamond Mills, and other persons named in the Grand Jury Motion and the Shaw Motion. Each would be called to testify with respect to facts that are identified as within his or her competence and that are set forth in detail in the Grand Jury Motion and the Shaw Motion. (Those who are presently employed as attorneys or agents for the Executive or who otherwise evidenced a reluctance to testify would be summoned as adverse witnesses.)

5. Judge Claiborne also incorporates specific allegations in this proffer the facts alleged in or incorporated into his pre-trial motions Nos. 2, 3, 10, and 25 (as numbered and identified in his Certificate of Service by Mailing and in the Appendix to Government's Response to Defendant's Pretrial Motions). In

addition to the witnesses previously named in this proffer, Judge Claiborne would call Stanley Brown as an adverse witness to testify with respect to his role in the representation of Joseph Conforte, the investigation of Judge Claiborne, and his conversations with agents and attorneys for the Justice Department and the FBI.

6. Judge Claiborne also incorporates the requests for discovery made in his pre-trial motions Nos. 1, 2, 3, 7, 8, 11, 15 (limited here to Joseph Conforte and such other witnesses who may be in the custody of, or being concealed by, the government), 16, 18, 19, 20, 27, and 30 and asserts them as discovery requests made in connection with the requests asserted in the Motion and upon the constitutional rights and privilege claimed in the Motion. As part of this

proffer; Judge Claiborne would expect to use the documents, testimony, and other evidence produced pursuant this Court's orders on these pre-trial motions to support the facts alleged in the Motion and in the facts set forth in this proffer.

Respectfully submitted,

OSCAR B. GOODMAN, ESQ.
WILLIAM RAGGIO, ESQ.
JOHN SQUIRE DRENDEL, ESQ.

By_____
OSCAR B. GOODMAN, ESQ.
520 South Fourth Street
Las Vegas, Nevada 89101
Telephone: (702) 384-5563

Attorneys for United States District Judge Harry Eugene Claiborne.

By _____
TERENCE J. ANDERSON, ESQ.
ROBERT S. CATZ, ESQ.
c/o University of Miami
School of Law
P.O. Box 248087
Coral Gables, FL 33124
Telephone: (305) 284-2971

As Special Counsel to Oscar Goodman, Esq.
Attorney for the Honorable
Harry Eugene Claiborne.

CONSTITUTIONAL AND STATUTORY PROVISIONS
Constitution of the United States

ARTICLE I.

Section 1.

All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2, clause 5.

The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

Section 3, clause 6.

The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

Section 3, clause 7.

Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States: but the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law.

ARTICLE II.

Section 1, clause 1.

The executive Power shall be vested in a President of the United States of America. . . .

Section 2, clause 1.

The President shall * * * have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment.

Section 2, clause 2.

. . . [H]e shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law. . . .

Section 3.

. . . He shall take Care that the Laws be faithfully executed, ...

Section 4.

The President, Vice President and all Civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

ARTICLE III.

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and

inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2, clause 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Section 3, clause 3.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; . . . .

United States Code
Title 28

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

* * *

(4)He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

* * *

28 U.S.C. §455 (1976 & Supp. IV 1981)

No. 83-1992

In the Supreme Court of the United States

OCTOBER TERM, 1984

HARRY EUGENE CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether an active federal judge must be impeached before he can be indicted and prosecuted for federal crimes involving the misuse of his judicial authority.

2. Whether petitioner's claim of "selective" or "vindictive" prosecution is appealable before trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Page

Constitution and statutes:

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1992

HARRY EUGENE CLAIBORNE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A39) is reported at 727 F.2d 842.

JURISDICTION

The judgment of the court of appeals (Pet. App. A41-A42) was entered on March 5, 1984. On April 27, 1984, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to June 3, 1984 (Sunday). The petition was filed on June 4, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 8, 1983, a seven-count indictment (Pet. App. A43-A54) was returned against petitioner in the United States District Court for the District of Nevada. Count One of the indictment charged that petitioner, a United States District Judge for the District of Nevada,

solicited and received a bribe from Joseph Conforte, a Nevada brothel owner, in return for favorable disposition of motions in a pending case, in violation of 18 U.S.C. 201(c). Count Two charged that petitioner caused an interstate telephone conversation to be made in furtherance of a scheme to defraud Conforte, in violation of 18 U.S.C. 1343. The scheme to defraud allegedly involved petitioner's false representation that he could secure the reversal of the criminal convictions of Joseph and Sally Conforte by bribing one or more judges of the United States Court of Appeals for the Ninth Circuit in return for $100,000 ($55,000 of which Conforte allegedly paid). Pet. App. A1-A2, A44-A48. Count Three charged that petitioner obstructed the administration of justice by urging a witness to give false testimony before a federal grand jury investigating petitioner, in violation of 18 U.S.C. 1503. Counts Four through Six charged petitioner with failing to report income on his 1978, 1979, and 1980 tax returns, in violation of 26 U.S.C. 7206(1). Count Seven, unrelated to the others, charged that petitioner knowingly failed to include an outstanding $75,000 loan on the financial disclosure form he filed with the Judicial Ethics Committee, in violation of 18 U.S.C. 1001. Pet. App. A3 n.1.

2. Petitioner moved to quash the indictment and to dismiss the proceedings against him on the ground that the Constitution prohibits the criminal prosecution of an active federal judge before he is removed from office through impeachment. After the district court denied the motion (Pet. App. A40), petitioner filed an interlocutory appeal.[1]

---

[1]Petitioner also applied for writs of mandamus and prohibition to stay the trial court from proceeding until the court of appeals resolved the merits of his interlocutory appeal (Pet. App. A4-A5). The court of appeals declined, without prejudice, to stay the district court's pretrial proceedings scheduled for February 21, 1984 (Pet. App. A5). As part of its decision on the merits, the court of appeals denied as moot

Finding that it had jurisdiction to hear an interlocutory appeal on petitioner's claim that a criminal proceeding could not be brought without a prior impeachment (Pet. App. A5), the court of appeals affirmed the district court's denial of the motion to quash the indictment (*id.* at A9-A29). The court of appeals also ruled that petitioner's claim of "vindictive" or "selective" prosecution was not appealable prior to trial (*id.* at A30-A31).

Petitioner's first trial, in April 1984, ended in a mistrial when the jury was unable to reach a verdict. On July 5, 1984, the district court, on the government's motion, dismissed Counts One through Four of the indictment. The retrial on the remaining counts began on July 31, 1984.

ARGUMENT

1. Petitioner contends (Pet. 8-13, 20-33) that the Constitution requires that he be removed from office through the impeachment process before he can be subjected to a criminal prosecution. This contention is without merit.

While the Constitution provides life tenure for judges (Art. III, § 1), which can be taken away only through the impeachment process (Art. II, § 4), nothing in the Constitution purports to confer upon a judge any immunity from criminal prosecution. Nor can it be said that the institution of criminal proceedings interferes in any way with Congress's exclusive power to impeach. Cf. *O'Shea* v. *Littleton*, 414 U.S. 488, 503 (1974); *Burton* v. *United States*,

---

petitioner's renewed motion to stay proceedings in the district court (Pet. App. A5, A31-A39). On March 12, 1984, Justice Rehnquist denied petitioner's application for a stay of those proceedings in order to permit this Court to review prior to trial the decision of the court of appeals, which was rendered on March 5, 1984. No. A-725. The stay application was resubmitted to Justice White and referred by him to the full Court, which denied it on March 14, 1984.

202 U.S. 344, 369 (1906) (members of Congress). See also *Chandler* v. *Judicial Council*, 398 U.S. 74, 141-142 (1970) (Black, J., dissenting). In addition to the absence of textual support for his extraordinary claim of judicial immunity from prosecution, petitioner points to no relevant decisional or other authority for support.[2] Thus, it is hardly surprising that the other courts of appeals that have considered this question have flatly rejected petitioner's contention and that this Court has denied certiorari in those cases. See *United States* v. *Hastings*, 681 F.2d 706, 710 (11th Cir. 1982), cert. denied, 459 U.S. 1203 (1983); *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974). There is no reason for a different result here.[3]

---

[2]The decision of the court of appeals does not, as petitioner urges (Pet. 26-33), conflict with the principles of *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), or *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982). The court of appeals correctly observed that "[b]oth cases are inapposite and of no aid to [petitioner]" (Pet. App. A28-A29 n.6). *Northern Pipeline* held invalid the 1978 Bankruptcy Act because it conferred Article III powers on Article I judges. It certainly did not suggest that Article III judges are immune from prosecution. *Nixon* addressed the question of immunity from civil liability for officials acting in their official capacity. The rationale for such immunity plainly does not extend to criminal conduct. See *United States* v. *Gillock*, 445 U.S. 360, 372-373 (1980); *O'Shea* v. *Littleton*, 414 U.S. at 503; see also *United States* v. *Brewster*, 408 U.S. 501, 516-520 (1972); *United States* v. *Isaacs*, 493 F.2d 1124, 1142 (7th Cir.), cert. denied, 417 U.S. 976 (1974).

[3]The flaws in petitioner's constitutional claim are discussed in more detail in the government's Brief in Opposition in *Hastings*, a copy of which has been provided to petitioner.

Petitioner also urges this Court (Pet. 20-26) to exercise its supervisory power to establish a uniform procedure among the courts of appeals for handling prosecutions of federal judges with minimum disruption. Fortunately, there have been very few criminal prosecutions of active federal judges. See *Hastings*, 681 F.2d at 709 n.7. Petitioner offers no evidence that the procedures used in these cases so lacked uniformity or were so unduly disruptive as to require the exercise of this Court's supervisory power.

2. Petitioner apparently also argues (Pet. i, 17-20) that the prosecutor has selected him for prosecution for impermissible reasons relating to his judicial decisions in government cases. The court of appeals correctly held (Pet. App. A30-A31) that this type of claim of "vindictive" or "selective" prosecution is not appealable before trial. As Justice Rehnquist observed in his opinion denying petitioner's request for a stay, his claim is squarely governed by *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263 (1982), which held that such claims do not fall within the "collateral order" doctrine. Like a speedy trial claim (*United States* v. *MacDonald*, 435 U.S. 850 (1978)), and unlike a double jeopardy claim (*Abney* v. *United States*, 431 U.S. 651 (1977)) or petitioner's own erroneous claim that the Constitution prohibits the trial of an active judge prior to impeachment, petitioner's "vindictive prosecution" claim does not encompass a right not to be tried at all. Petitioner advances no reason why he is prejudiced if this claim cannot be raised after trial or why, as a judge, he should be excepted from the general holding of *Hollywood Motor Car* applicable to other individuals. In any event, in light of the commencement of petitioner's retrial on July 31, 1984, his claim of a right of interlocutory appeal now appears to be moot.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

GLORIA C. PHARES
Attorney

AUGUST 1984

DOJ-1984-08